United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

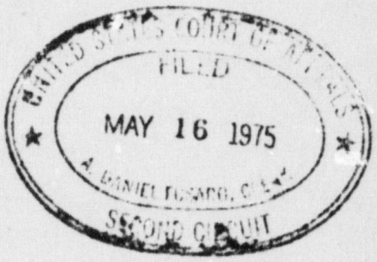
ORIGINAL

75-7220

To be argued by
MARTIN TUCKER

United States Circuit Court of Appeals

For the Second Circuit



BALDT CORPORATION,

Plaintiff-Appellee,

v.

TABET MANUFACTURING CO. INC.,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

B
P/s

APPELLANT'S BRIEF

LANDIS, TUCKER & GELLMAN, P.C.
Attorneys for Defendant-Appellant
285 Madison Avenue
New York, New York 10017
(212) 689-7200

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Docket No.
T-4476

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PRELIMINARY STATEMENT

The sole issue herein is whether the District Court had jurisdiction over the person of the defendant.

The appeal is from the decision of Judge Tenney dated June 18, 1973 denying defendant's motion to dismiss for lack of jurisdiction. Judge Tenney's opinion appears at pages 81a to 86a of the Appendix. That part of his opinion denying the motion to dismiss on the jurisdictional ground appears at pages 82a and 83a.

ISSUES PRESENTED FOR REVIEW

1. Where the resolution electing an individual assistant secretary of a corporation specifically limits his authority to the execution of certain documents, is his authority as assistant secretary terminated when he completes execution of the documents?

2. Did the District Court acquire personal jurisdiction over the defendant when process was served on an unauthorized individual, but the defendant received notice of the commencement of the action shortly thereafter?

3. Did the District Court acquire personal jurisdiction over the defendant where plaintiff had invited defendant, a foreign corporation, into New York for the ostensible purpose of discussing settlement, but where plaintiff's true purpose was to entice defendant into the jurisdiction to serve process on it?

STATEMENT OF THE CASE

There are no pleadings in this case. Appellee Baldt Corporation ("Baldt") commenced the action against Appellant Tabet Manufacturing Company Inc. ("Tabet") in Supreme Court, New York County by service of a summons and a motion for summary judgment in lieu of complaint. After removal to the District Court, Tabet cross-moved to dismiss for insufficiency of service of process, contending that the Court did not have jurisdiction over the person of the defendant. Baldt's motion for summary judgment and Tabet's motion to dismiss on jurisdictional grounds were both denied by Judge Tenney.

Thereafter, the case was tried without a jury before Judge Tenney, who rendered judgment on the merits in favor of Baldt (178a to 195a).

Baldt is a Delaware corporation with an office in New York City (13a). Tabet is a Virginia corporation with its office in Norfolk, Virginia (13a). Tabet does not do business in the State of New York, maintains no office here and never agreed to submit itself to the jurisdiction of this State.

The action below was to recover on certain promissory notes made by Tabet to Baldt in connection with the acquisition by Tabet of certain of the assets of

Baldt's Palmer Division. The defenses were set-off, and breach by Baldt of the contract of acquisition (6a to 58a; 66a to 80a).

The negotiations for the acquisition were conducted under great time pressure. The bargain was struck by the parties on Thursday, July 1, 1971, at a meeting at Tabet's office in Norfolk, Virginia (102a). James H. Hollyer, Baldt's executive vice president, represented Baldt at this meeting, and Michael Tabet, president, and Hughes D. Burton, vice president, represented Tabet (102a, 103a). On Tuesday, July 6, two business days later (Monday, July 5, being a holiday), the parties met in New York to review the various legal documents, which had been prepared in the meantime by Baldt's counsel (110a). Present at this July 6 meeting for Tabet were Mr. Burton and Vincent A. Mastracco, Jr., Esq., a partner in the law-firm of Canoles, Mastracco, Martone and Barr of Norfolk, Virginia, outside counsel for Tabet. Present for Baldt were Mr. Hollyer and Ernest Lorch, Esq., a partner in the New York firm of Olwine, Connelly, Chase, O'Donnell and Weyher (the "Olwine firm"), Baldt's outside counsel (110a).

The parties reviewed the proposed contract and other documents at the July 6 meeting and agreed to certain changes (111a). That same evening, according to the testimony of Baldt's Mr. Hollyer, Mr. Burton and Mr.

Mastracco flew back to Norfolk "to get their necessary corporate resolutions in order" and obtain the funds required for the closing (115a).

Late that same night, July 6, Mr. Burton and Mr. Mastracco met with the Tabet Board of Directors at a special meeting called to consider the proposed acquisition (64a). The Board approved the acquisition. Since it would be necessary to have an officer at the execution of the contract to attest to Mr. Burton's signature as vice president, the Board elected Mr. Mastracco assistant secretary for the sole purpose of executing the documents, along with Mr. Burton (64a). The closing was to be held in New York the next day, so that Mr. Mastracco, as outsid counsel, was already scheduled to fly back to New York with Mr. Burton the next morning to review the documents.

The resolution passed by the Tabet Board reads as follows (63a):

> "RESOLVED that Vincent J. Mastracco, Jr. be elected Assistant Secretary of the Corporation for the purpose of executing, along with Hughes D. Burton, Vice President of the Corporation, notes, agreements, and other documents pertaining to the acquisition by the Corporation of the assets of Palmer Electric Company."

Tabet's reason for the election of Mr. Mastracco as assistant secretary are clearly stated in the affidavit of Mr. Burton, sworn to March 28, 1973, submitted on the motion to dismiss, which are nowhere disputed in the

Record (64a, 65a):

> "The basic terms of the contract had been worked out and it was anticipated that the contract would be executed. Therefore, it was necessary that an officer be available at the execution of the contract to attest the signature of the executing officer of Tabet. Pursuant to a resolution of the Board of Directors of Tabet, held at its offices in Norfolk, Virginia, on July 6, 1971, Mr. Mastracco was elected Assistant Secretary of the Corporation for the sole purose of executing, along with me, the necessary documents pertaining to the acquisition of the Palmer Electric Division of Baldt Corporation. A copy of that resolution is attached to this affidavit. Mr. Mastracco prior to July 6, 1971, was neither an officer nor director of Tabet nor since July 7, 1971, has he been authorized to act nor has he acted as an officer and director of Tabet Manufacturing Company, Inc. His authority was expressly limited to attesting to my signature in the execution of the documents acquiring the Palmer Division and at no time has he been given authority by the Board of Directors of Tabet to execute any other documents as an officer and director of Tabet or to receive or accept service of process as an officer and director of Tabet."

The next morning (July 7, 1971), Mr. Burton and Mr. Mastracco flew back to New York where they again met with Mr. Hollyer and Mr. Lorch (115a). Mr. Mastracco reviewed the documents as the outside attorney for Tabet (116a). The necessary revisions in the agreement and other documents were made and the parties executed the Agreement, notes and other documents (116a, 122a).

An examination of the documents signed by the parties on July 7, 1971 reveals that Mr. Mastracco exe-

cuted them in only two places: at the end of the Agreement of Acquisition (28a) and at the end of the Assumption of Liability Agreement (54a). In both places, after Mr. Burton's signature as vice president of Tabet, the following appears: "Attest:
/s/ Vincent A. Mastracco, Jr.
Asst. Secretary"

Vincent A. Mastracco, Jr. is a member of the Norfolk, Virginia lawfirm of Canoles, Mastracco, Martone and Barr, outside counsel for Tabet (61a). Except for his two signatures attesting Mr. Burton's execution of the documents, there is no evidence in the Record that he ever acted for Tabet other than as outside counsel. Such correspondence to or from Mr. Mastracco as is in the Record was always on his law firm's letterhead or addressed to him at the office of his law firm. (See for example, his letter dated November 15, 1972 attached to Mr. Hollyer's affidavit on summary judgment, p.40a).

In 1972, a dispute arose between the parties as to the meaning of the words "accounts payable" in the Agreement. Mr. Mastracco participated in the attempts to settle the dispute, but his sole function was clearly that of outside attorney (40a).

In January 1973, the dispute had reached a point where litigation was threatened. Tabet asked Mr. Mastracco, as its outside attorney, to travel to New York

to confer with Baldt and its counsel in an effort to reach a settlement (65a). On January 22, 1973, Mr. Mastracco met in New York with Mr. Hollyer and Thane Benedict, III, Esq. of the Olwine firm (62a). At the conclusion of this settlement meeting, Mr. Benedict served upon Mr. Mastracco the summons and motion for summary judgment in lieu of complaint (62a) consisting of approximately 55 pages (3a to 58a). Mr. Mastracco informed Mr. Benedict that he was not an officer of Tabet, but Mr. Benedict refused to withdraw the papers (62a).

SUMMARY OF ARGUMENT

The words of the resolution electing Mr. Mastracco assistant secretary, and the surrounding circumstances, make clear that he was elected for the sole purpose of signing the Agreement and other papers pertaining to the acquisition by Tabet of the assets of Palmer Electric. Once he finished signing these papers on July 7, 1971, his tenure as assistant secretary was terminated and he thereafter had no authority to receive process. The law of agency confirms that once Mr. Mastracco, who was a special agent of Tabet, completed the assigned task of signing the documents on July 7, 1971, his authority as a special agent terminated. If the Court finds that Mr. Mastracco was not assistant secretary of Tabet on January 22, 1973, service on him, whether as a former officer or the attorney for Tabet, was ineffective. The fact that Tabet received notice of the commencement of the action did not cure the improper service of process. If the Court should find that Mr. Mastracco was an assistant secretary on January 22, 1973, the Court still did not have jurisdiction because Tabet had been enticed into the State for the service of process.

ARGUMENT

POINT I

THE LAW OF NEW YORK GOVERNS THE EFFECTIVENESS OF THE SERVICE OF PROCESS

Rule 4(d) F.R.C.P. states that service upon a foreign corporation shall be made by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. Alternatively, Rule 4(d)(7) F.R.C.P. provides that service of process shall be sufficient if served in the manner prescribed by the law of the state in which the district court is held.

> "It will thus be seen that the determination of validity of service in federal actions under Rule 4(d)(7) depends on an appraisal by the federal court of the propriety of service under applicable state statutes and rules. A similar determination of state law must be made when service originally made in a state action is challenged after the action has been removed to federal court. 2 Moore, Federal Practice, Par. 4.22[3] at 1133, 1134 (2d ed. 1970)."

Since the action was removed from the New York courts, if service was defective under New York law, the District Court did not acquire in personan jurisdiction over the defendant. Meyer v. Indian Hill Farm, 285 F.2d

287 (2nd Cir. 1958), Simon v. McWilliam Industries Inc., 286 F. Supp. 564 (S.D.N.Y. 1968).

New York CPLR Sec. 311 directs that personal service upon a foreign corporation be made by delivering the summons to an officer, director, managing or general agent, or cashier, or assistant cashier or to any other agent authorized by appointment or by law to receive service.

We shall show that on January 22, 1973, Mr. Mastracco, the individual on whom process was served, was not an officer, or managing or general agent of Tabet, nor was he authorized by appointment or by law to receive service. He was simply an outside attorney who had come to New York to represent his client, Tabet, in settlement negotiations. Service on him was therefore completely ineffective.

POINT II

MR. MASTRACCO'S TENURE AS ASSISTANT SECRETARY OF TABET TERMINATED WHEN HE COMPLETED THE EXECUTION OF THE PAPERS ON JULY 7, 1971

Judge Tenney essentially gave two reasons for the denial of Tabet's motion to dismiss:

(1) There was no evidence that Mr. Mastracco resigned or otherwise terminated his office between July 6, 1971 and January 22, 1973. He was therefore still assistant secretary when served.

(2) Service upon Mr. Mastracco gave fair and adequate notice to Tabet of the commencement of the action against it.

The second reason will be discussed in Point IV (c) of this brief. As to the first reason, it is respectfully submitted that Judge Tenney was in error. It was not necessary that Tabet show that Mr. Mastracco had resigned or otherwise terminated his office. That would have been true had Mr. Mastracco been elected with the usual authority of an assistant secretary. However, the resolution electing Mr. Mastracco so specifically limited his authority to signing the documents pertaining to the acquisition of the Palmer Division, that his tenure as assistant secretary terminated by operation of law on July 7, 1971, when he completed his execution of those

documents.

It is basic corporate law that in the absence of any contrary provision in the by-laws, officers of a corporation have such authority as may be granted them by resolution of the board of directors. Thus, Section 13.1-45 of the Virginia Code (which governs the authority of the officers of Tabet, a Virginia corporation) provides that officers of the corporation shall have such authority "as may be determined by resolution of the board of directors not inconsistent with the by-laws". There is an almost identical provision in the New York statute (Section 715(d), Business Corporation Law).

Thus, in the absence of any contrary provision in the by-laws (of which there is no evidence in this case), the board may assign each officer such authority as it desires, no matter how limited. Further, the board may elect an officer for such term as it desires, and may therefore sharply limit his authority in terms of time.

We must therefore turn to the resolution of the Board of Directors appointing Mr. Mastracco to ascertain just what authority he was granted, and the term for which he was elected:

> "RESOLVED, that Vincent J. Mastracco, Jr. be elected Assistant Secretary of the Corporation for the purpose of executing, along with Hughes D. Burton, Vice President of the Corporation, notes, agreements, and other documents pertaining to the acquisition by

the Corporation of the assets of Palmer Electric Company."

Thus, the words of the resolution clearly and specifically limit Mr. Mastracco's authority to executing, along with Mr. Burton, the documents pertaining to the acquisition by Tabet of the assets of Palmer Electric.

We submit that the Board's resolution could not have been more restrictive in the authority granted to Mr. Mastracco. Equally important with what the resolution says, however, is what it does not say. Nowhere in the resolution do we find the language that Mr. Mastracco is elected until "the next annual meeting of the board of directors" or "until his successor is elected and qualifies" or other similar language commonly used for the election of a corporate officer. The reason, of course, is that Mr. Mastracco was not being elected for the usual term, or to have the usual authority of an assistant secretary. He was being elected for a very limited, specific purpose: to sign the agreement and other papers pertaining to the acquisition by Tabet of the assets of Palmer Electric. Once he finished signing his name on the contract and the assumption of liability agreement on July 7, 1971, he had fulfilled the limited purpose for which he was elected. After July 7, 1971, he therefore no longer had any authority as assistant secretary, and his term of office had terminated.

When the specific, limiting words of the resolution are considered in the context of the unusual circumstances under which it was adopted, it becomes even clearer that Mr. Mastracco's tenure as assistant secretaary ended on July 7, 1971. The negotiations for the acquisition were conducted under great time pressure. In spite of the fact that the parties were in different cities, the papers were all signed and the closing held within three business days of the day on which the parties had struck their bargain. Thus, the deal was made in Norfolk on July 1 (102a). Two business days later, on July 6, the parties met in New York with their attorneys to review the proposed agreement and other documents (110a). Certain changes were agreed to (111a). That same evening, according to the testimony of Baldt's Mr. Hollyer, Mr. Burton and Mr. Mastracco flew back to Norfolk "to get their corporate resolutions in order " and obtain the funds required for the closing (115a). After arriving in Norfolk that night (July 6), Mr. Burton and Mr. Mastracco met with the Tabet Board of Directors at a special meeting called to consider the proposed acquisition. The Board approved the acquisition, and then passed the resolution quoted above (163a).

Baldt contends on this appeal that the authority of Mr. Mastracco extended beyond July 7, 1971, and that he was still assistant secretary when he was served on

January 22, 1973. In weighing this contention, we submit that the Court must ask the question: What authority did the Board of Directors of Tabet intend to give Mr. Mastracco when it passed the resolution? We have already shown that the words of the resolution themselves specifically limit Mr. Mastracco's authority to the execution of the July 7, 1971 papers. The only other evidence in this case as to the Board's intention is contained in the affidavit of Mr. Burton, sworn to May 28, 1973, submitted on the motion to dismiss (64a, 65a). He states clearly (64a) that the Board elected Mr. Mastracco assistant secretary because "it was necessary that an officer be available at the execution of the contract to attest the signature of the executing officer of Tabet" (i.e. Mr. Burton). He further states that:

> (a) "Mr. Mastracco was elected Assistant Secretary of the Corporation for the sole purpose (underscoring supplied) of executing, along with me, the necessary documents pertaining to the acquisition of the Palmer Electric Division of Baldt Corporation" (64a, 65a).
>
> (b) "Prior to July 6, 1971, Mr. Mastracco was neither an officer or director of Tabet" (65a).
>
> (c) "After July 7, 1971 Mr. Mastracco was not authorized, nor has he acted, as an officer and director of Tabet" (65a).
>
> (d) "Mr. Mastracco's authority was expressly limited to attesting to my signature in the execution of the documents acquiring the Palmer Division" (65a).

(e) "At no time was Mr. Mastracco given authority by the Board of Directors of Tabet to accept service of process as an officer of Tabet" (65a).

And, of course, the Board's election of Mr. Mastracco to sign the documents as assistant secretary made a great deal of practical sense. The closing was scheduled for the very next day in New York, and Mr. Mastracco, as Tabet's outside counsel, had to be there to review the revised documents. He was already scheduled to fly back to New York with Mr. Burton the next morning. Electing Mr. Mastracco to sign the documents therefore avoided the necessity of sending another Tabet officer to New York to execute them with Mr. Burton.

Thus, the only evidence before this Court is that Mr. Mastracco was elected assistant secretary on July 6, 1971 for the sole purpose of signing the documents relating to Tabet's acquisition of the Palmer Division. Once he completed signing those documents on July 7, 1971, his authority as assistant secretary was terminated.

POINT III

THE LAW OF AGENCY CONFIRMS THAT MR. MASTRACCO WAS A SPECIAL AGENT OF TABET AND THAT HIS AUTHORITY ENDED ON JULY 7, 1971

(a) The Relationship Between A Corporation And Its Officer Is One Of Principal And Agent.

Corporations, by their very nature, must act through individuals. The relationship between a corporation and its officers is that of principal and agent, and in the absence of statutory provision to the contrary, is governed by the general principles of the law of agency. That is the rule in Virginia, New York, and other jurisdictions. Coastal Pharmacy Co. v. Goldman, 213 Va. 831, 195 S.E. 2d 848 (1973), Damson & Kelly v. Citizens National Bank, 112 Va. 544, 72 S.E. 153 (1911), Taylor v. Sutherlin Wende Tobacco Co., 107 Va. 787, 60 S.E. 132 (1908), Olcate v. Troga R.R. Co., 27 N.Y. 546 (1863), Bright v. Virginia and Gold Hill Water Co., 254 F.175 (D.C., Nev., 1918), Soragban v. Henlopen Acres Inc., 236 F. Supp. 489 (D.C., Del., 1964), Richardson v. Delaware Loan Association, 14 Del. 354, 32 A.980 (1893) (a secretary of a corporation is its agent), Johnson v. Maryland Trust, 176 Md. 557, 6A.2d 283, Severance v. Heyl & Patterson, 125 Pa. Super 554, 187 A. 53 (1936); De Pasquale v.

Societa d M.S. Narra, 54 R.I. 399, 173 A. 623 (1934).

(b) Mr. Mastracco Was A Special Agent Of Tabet, And Not Its General Agent.

The law of agency distinguishes between two types of agents: general and special. A general agent has the authority "to transact all the business of his principal of a particular kind". Corklite Co. v. Rell Realty Corp., 249 N.Y. 1,6, 162 N.E. 565, reargument denied, 249 N.Y. 516, 164 N.E. 516 (1928). A special agent's authority is limited to some "particular act or . . . some particular occasion" and generally pursuant to "specific instructions or limitations necessarily implied from the nature of the work to be done." Donroy, Ltd. v. United States, 301 F.2d 200,206 (9th Cir. 1962). See also, Arkansas Medical & Hosp. Service, Inc. v. Crager, 200 Ark 704, 249 S.W.2d 554 (1952); Farm Bureau Mut. Ins. Co. v. Coffin, 136 Ind. App. 122 (1962); Weichel v. Lojka, 185 Neb. 819, 179 N.W. 2d 112 (1970); Lockwood v. Embalmers Supply Co., 233 App. Div. 189, 251 N.Y.S. 321 (4th Dept. 1931); Lane v. Lane, 229 App. Div. 50, 240 N.Y.S. 537 (3rd Dept. 1930); Seergy v. Morris Realty Corp., 138 Va. 572, 121 S.E. 900 (1924); Bowles v. Rice, 107 Va. 51, 57 S.E. 575 (1907).

We submit that as in Donroy Ltd. v. United States, supra, Mr. Mastracco's authority was limited to a "particu-

lar act" (the execution of the documents) and "a particular occasion" (the closing at which they were signed). He completed the act, and the occasion was ended, on July 7, 1971. Thereafter, he no longer had any authority.

(c) Once Mr. Mastracco Performed His Assigned Task Of Executing The Papers on July 7, 1971, His Authority As A Special Agent Of Tabet Was Terminated.

The Restatement (Second) of Agency, Section 106(a), states the rule as follows:

> "Where an agent has been authorized to perform a specified transaction, his authority terminates when he has completed the transaction; he does not, because of such previous authority have authority to deal further with the subject matter".

There is an abundance of case law to illustrate this principle. An agency created for securing a purchaser of property terminates when the property has been sold. Cooper v. Cooper, 206 Ala. 519, 91 So. 82 (1921); Hamilton Park v. Rogers, 4 Misc.2d 269, 156 N.Y.S.2d 891 (Sup. Ct., Queens County 1956). Where the agency was created to secure a loan, the receipt of the money by the borrower, the execution of papers required for the transaction, and delivery of the papers to the respective parties terminates the agency. Scudder v. Hart, 45 N.M. 76, 110 P.2d 536 (1941). An agency created to bring about the sale of a house is terminated when the house is sold.

Hardy v. Davis, 223 Md. 229, 164 A.2d 281 (1960). The agency relationship created between a travel agent and a traveler seeking to obtain airline tickets is terminated upon receipt of and payment for the tickets. Levine v. British Overseas Airways Corp., 66 Misc.2d 820, 322 N.Y.S. 2d 119 (Civil Ct., N.Y. County 1971). See also Echaide v. Confederation of Canada Life Ins., 459 F.2d 1377 (5th Cir. 1972); Williams Estate v. Luch, 313 Ill. App. 230, 39 N.E. 2d 695 (1942); One Twenty Realty Co. v. Balk, 260 Md. 400, 272 A.2d 377 (1971); Neavitt v. Lightner, 155 Md. 365, 142 A. 109 (1928); Carpenter v. Overland Tire Co., 102 N.J.L. 196, 130 A. 66 (1925).

In the case at bar, Mr. Mastracco became a special agent of Tabet, with his authority limited to executing the documents, along with Mr. Burton, pertaining to the acquisition of the assets of the Palmer Division. Once he fulfilled these duties by signing the papers on July 7, 1971, the agency was terminated. Thereafter, Mr. Mastracco's sole function in the transactions was as the outside attorney for Tabet.

POINT IV

IF THE COURT FINDS THAT MR. MASTRACCO WAS NOT ASSISTANT SECRETARY OF TABET ON JANUARY 22, 1973, SERVICE ON HIM WAS INEFFECTIVE

Section 311 (i) CPLR provides that personal service on a domestic or foreign corporation shall be made by delivery of the summons to a director, officer, or a managing or general agent. If Mr. Mastracco was no longer assistant secretary on January 22, 1973, service on him on that date did not give the Court jurisdiction over the person of Tabet.

(a) Service On A Former Officer Is Ineffective.

Service on a former officer of a corporation is not effective to obtain in personam jurisdiction over the corporation. Gaboury v. Central Vermont Ry Co., 250 N.Y. 233, 165 N.E. 275 (1929) (Service on director after appointment of receivers); Building Trades Service Bureau v. S. W. Straus Investing Corp., 241 App. Div. 869, 272 N.Y.S. 73 (1934) (service on secretary after appointment of receivers); Yorkville Bank v. Henry Zellner Brewing Co., 80 App. Div. 578, 80 N.Y.S. 839, appeal dismissed, 178 N.Y. 572, 70 N.E. 1111 (1903) (service on president and director after resignation). Weinstein, Korn & Miller, New York Civil Practice, Sec. 311.03. See also Westcott-

Alexander, Inc. v. Dailey, 264 F.2d 853 (5th Cir. 1959); Chemical Corp. v. Northeast Coal & Dock Corp., 249 F. Supp. 597 (S.D. Maine 1966); Kliver v. Middlewest Grain Co., 44 N.D. 210, 173 N.W. 468 (1919).

(b) Service On An Attorney For A Defendant Is Ineffective.

When Mr. Mastracco was served on January 22, 1973, he was in New York as an attorney representing Tabet. The law is clear that service on the attorney for a person is ineffective to obtain jurisdiction. State v. Cortelle Corp., 73 Misc.2d 352, 341 N.Y.S.2d 640 (Sup. Ct. Nassau County 1972), aff'd, 349 N.Y.S.2d 653; Duckworth v. Duckworth, 200 Misc. 10, 105 N.Y.S.2d 617 (Sup. Ct., N.Y. County 1951).

(c) The Fact That Tabet Received Notice Of The Commencement Of The Action Did Not Give The Court Personal Jurisdiction Over It.

One of the two grounds given by Judge Tenney in his opinion denying defendant's motion to dismiss is as follows (83a):

> "Even if it could be argued that service did not comply with the literal terms of the applicable statute, it certainly gave fair and adequate notice to Tabet of the commencement of the action against it. Accordingly, the motion to dismiss for improper service must be denied."

We respectfully submit that Judge Tenney was in

error in so holding, for the law in New York is that where the person served has no authority to receive process, the fact that the actual defendant receives delivery of the papers shortly thereafter is not sufficient to give the court jurisdiction. The most recent New York Court of Appeals decision on this subject is McDonald v. Ames Supply Co., 22 N.Y.2d 111, 291 N.Y.S.2d 328, 238 N.E.2nd 726 (1968). In that case, the summons and complaint were served upon the building receptionist, who was not employed by the third-party defendant, a foreign corporation. The receptionist in turn, handed it to the third-party defendant's sales manager when he returned to the office. In unanimously affirming a judgment that there was no jurisdiction over the third-party defendant because of improper service, the Court said:

> "Plaintiff contends that delivery was properly effected when the receptionist handed the summons to Schlossman (the sales manager). However, this contention is contrary to well-established authority and to the policies underlying the requirement of personal delivery in the CPLR and the prior Civil Practice Act.
>
> "Numerous authorities hold that personal delivery of a summons to the wrong person does not constitute valid personal service even though the summons shortly comes into the possession of the party to be served (Clark v. Fifty Seventh Madison Corp., 13 A.D.2d 693, 213 N.Y.S.2d 849 app. dismd. 10 N.Y.2d 808, 221 N.Y.S. 2d 509, 178 N.E. 2d 225; Commissioners of State Ins. Fund v. Singer Sewing Mach. Co., 281 App. Div. 867, 119 N.Y.S.2d 802; Loeb v. Star & Herald Co.,

> 187 App.Div. 175, 179, 175 N.Y.S. 412, 412; Beck v. North Packing & Provision Co., 159 App. Div.418, 420-421, 144 N.Y.S. 602, 604-605; O'Connell v. Gallagher, 104 App.Div. 492, 493, 498, 93 N.Y.S. 643, 644, 645; Eisenhofer v. New Yorker Zeitung Pub. Co., 91 App.Div. 94, 86 N.Y.S. 438; contra, Erale v. Edwards, 47 Misc.2d 213, 262 N.Y.S. 2d 44). A contrary rule would negate the statutory procedure for setting aside a defectively served summons, since the motion itself is usually evidence that the summons has been received (see Loeb f. Star & Herold Co., supra; Eisenhofer v. New Yorker Zeitung Pub. Co., supra)."

And in Isaf v. Penn R.R., 32 App.Div. 2d 578, 299 N.Y.S.2d 231 (3rd Dept. 1969), the Court held that service on a clerk in defendant's office who was not a managing agent was not effective to obtain personal jurisdiction, even though the summons was redelivered to the managing agent thirty minutes later.

POINT V

EVEN IF MR. MASTRACCO WAS STILL ASSISTANT SECRETARY ON JANUARY 22, 1973, SERVICE WAS INEFFECTIVE BECAUSE TABET HAD BEEN ENTICED INTO THE JURISDICTION FOR THE SERVICE OF PROCESS

Where a defendant has been enticed into a jurisdiction for the purpose of serving him with process, such service will be set aside. Garabetian v. Garabetian, 206 App.Div. 502, 201 N.Y.S. 548 (1st Dept. 1923); Olean St. Ry Co. v. Fairmount Construction Co., 55 App.Div. 292, 67 N.Y.S. 165 (4th Dept. 1900).

An important issue in the enticement cases is the good faith of the plaintiff. Allen v. Wharton, 13 N.Y.S. 38 (1st Dept. 1891). Where the facts suggest that plaintiff's invitation to discuss a settlement was not made in good faith, the courts have not hesitated to hold the service of process ineffective. In Allen v. Wharton, supra, plaintiff denied that he intended to induce the defendant into the jurisdiction for the purpose of serving him. Nevertheless, the court found the following facts to be suspicious: The summons had been prepared for service on the day the defendant entered the jurisdiction; plaintiff had the summons with him when he met the defendant to discuss settlement; and the summons was served on the defendant at the close of the meeting. Under these

circumstances, the Appellate Division held that when it became evident that no possibility of settlement existed, good faith on the part of the plaintiff required that he should have allowed the defendant to leave the jurisdiction without serving him with process.

Similarly, in Olean St. Ry Co. v. Fairmount Construction Co., supra, the defendant came into plaintiff's jurisdiction at plaintiff's request to attempt to resolve their differences. At the negotiations, plaintiff announced that he could not come to any settlement until he had spoken with a third party. At that moment, a process server appeared and served the defendant with a summons. In setting aside the service of process, the Court stated:

> "Assuming, however, that the coincidence to which we have referred was purely accidental, and not the result of any trick or device. . . in these circumstances we think that good faith and a due regard for the proprieties of the case required of the plaintiff that, when the negotiations for a settlement terminated, a reasonable opportunity should have been afforded the [defendant] to leave the city and state before any attempt was made to serve a summons upon him. . . 55 App.Div. 292,294, 67 N.Y.S. 165, 167."

See also Cavanagh v. Manhattan Transit Co., 133 F. 818 (C.C.N.Y. 1905); Western States Refining Co. v. Berry, 6 Utah 2d 336, 313 P.2d 480 (1957).

We submit that in the case at bar, a "due regard to the proprieties" of the case similarly required

Baldt's attorney to refrain from serving Mr. Mastracco. For it is undisputed that Mr. Mastracco came from Virginia into New York on January 22, 1973 solely to discuss settlement, and that at the so-called "settlement meeting", Mr. Benedict served Mr. Mastracco with process.

This act on the part of Mr. Benedict was, at the very least, an inhospitable and discourteous act to a fellow attorney, who had into the jurisdiction in good faith to discuss settlement. In addition, however, we submit that it was the culmination of a plan to entice defendant into the jurisdiction for the service of process. It is significant to note that the papers served upon Mr. Mastracco, including the exhibits to the motion papers, were approximately 55 pages in length and had already been signed by Baldt. They had obviously been carefully prepared at least several days before the meeting. The Court may certainly infer from these facts that Tabet was invited into the jurisdiction not for settlement discussions, but so that process could be served on it.

There is also an important question of public policy involved in this case. We submit that the Court should encourage the settlement of potential lawsuits, and the travel of individuals from one state to another for that purpose. A rule of law which permits a person who comes into a state in good faith to discuss settlement

of a potential lawsuit to be served with process certainly does not encourage such settlement negotiations or interstate travel. We submit that a more desirable rule would be that whenever an individual travels from his home state to another in good faith for the purpose of discussing settlement of a potential lawsuit, he may not, during that trip, be served in the other state with process commencing the lawsuit he is attempting to settle.

CONCLUSION

Since Baldt was not properly served, the District Court had no jurisdiction over its person. The judgment must therefore be reversed, and the action dismissed.

Respectfully submitted,

LANDIS, TUCKER & GELLMAN, P.C.

New York, New York
May 12, 1975

By: _____

Martin Tucker
Member of the Firm
Attorney for Appellant
285 Madison Avenue
New York, New York 10017

Service of ~~three (3)~~ Two (2) copies of the within

Brief is hereby admitted.

this 15th day of May 1975

Olwine Connelly Chero O'Donnell & Weyher

Attorney(s) for Plaintiff - Appellee